

# **PROPERTY AND “NO PROPERTY”**

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## Property and “No Property”

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Does property enhance freedom? In the early part of the twentieth century, Realist legal thinkers developed two related insights relevant to this question about the nature of property rights. The first was that property rights are in an important sense social; property rules involve legal relations among persons with respect to things, not relations between persons and the things themselves.<sup>1</sup> The related insight was that these social rights have a political dimension; property rules confer “sovereignty” on private owners, who can set the terms under which nonowners obtain access to the owners’ goods. In this sense, “dominion over things is also *imperium* over our fellow human beings.”<sup>2</sup>

We can see traces of these two insights in some of the more important debates in property theory today. Commons and anti-commons problems are in a meaningful sense problems of social relationships, involving incentives and disincentives for individuals to work together effectively (if not efficiently) in the management of resources.<sup>3</sup> The *numerus clausus* principal,

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<sup>1</sup> This insight structures much modern thinking about property law. A leading property casebook opens with the following statement: “Property rights concern relations among people regarding control of valued resources.” JOSEPH WILLIAM SINGER, *PROPERTY LAW* xlv (3d ed. 2002). Nonetheless, some contemporary property theorists dispute this observation and argue that “the in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution.” Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L.J.* 357, 359 (2001).

<sup>2</sup> Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 13 (1927).

<sup>3</sup> On commons and anti-commons problems, see generally Hanoach Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549 (2001); Michael A. Heller, *The Tragedy of the*

which requires that property rights take only a limited number of standardized forms, can be justified in terms of its of reducing information costs suffered by third parties, another social concern.<sup>4</sup>

The sovereignty insight is similarly influential today. “Private” property rights are not self-enforcing; thus “private” property schemes require governments.<sup>5</sup> The relation of “public” and “private” power has been debated in numerous contexts, including (just to name two) that of “new property” in government benefits<sup>6</sup> and of “exactions,” the concessions demanded by government as the price of permission to make certain uses of private land.<sup>7</sup>

Contemporary property debates tend to focus on what might be called the affirmative side of property rights—what they give (or ought to give) to owners vis a vis others and vis a vis the government.<sup>8</sup> But if property is social, involving relations between people, and if property involves politics, the exercise of power by some over others, then it makes sense to think about

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*Anti-Commons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

<sup>4</sup> Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

<sup>5</sup> For a recent expression of this idea, see JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 7, 36, 68 (2000). For an explanation of why this idea has not been more influential, see Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 230-33 (2002).

<sup>6</sup> Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>7</sup> See, e.g., Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004).

<sup>8</sup> See, e.g., Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 NYU L. REV. 1669 (2003); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

the negative side of property rights, the effects of not having any property to speak of. Persons owning very few things inhabit a realm of severe social and legal vulnerability, susceptible to the power of many (and, of course, the government) without having (m)any reciprocal power(s) over others. This is not to say that those without substantial property have no rights at all; they remain free to speak, they retain their legal protection against physical assault, they may not be coerced into confessing should they face criminal charges, and so forth. But with respect to many aspects of life, those with little property tend to experience, not their own exercise of their own rights, but others' exercise of rights that affect them.

Consider, in this regard, the homeless. Abstractly, persons who are homeless have the same property rights as anyone else, with respect to whatever they might own. But it is unlikely, if a person is homeless, that she owns much. Her experience of property is thus likely to be not the rights-asserting, power-enforcing side, but the side that imposes duties (for example, to stay out of private spaces into which she is not invited) and liabilities (for example, to civil or criminal penalties for trespass).<sup>9</sup> People who own property can exert power over her (they can make her move off their land, and if she doesn't the police will come and add the government's power to the private owner's), but she has not much with which to exert power over others.

Scholars have long been aware of the disparities of power that accompany disparities in wealth. Thus, in the 1920s, reacting to *Lochner*, Morris Cohen characterized as a "fiction" the notion that labor contracts were in fact free bargains in which workers happily agreed to render services in exchange for money: "The money needed for purchasing things must for the vast

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<sup>9</sup> For eloquent development of this point in the context of public spaces, where the homeless have no right to be, see Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

majority be acquired by hard labor and disagreeable service to those to whom the law has accorded dominion over the things necessary for subsistence.”<sup>10</sup> Robert Hale made the same point, also with respect to labor, in the 1940s: “The employer’s power to induce people to work for him depends largely on the fact that the law previously restricts the liberty of these people to consume, while he has the power, through the payment of wages, to release them to some extent from these restrictions.”<sup>11</sup> Their main point was that, by defining “private” property rights in a particular way, government had always invisibly regulated the “free” market in favor of those already in possession of capital and therefore government could “re-regulate” it—via minimum wage and hour laws or other measures—without violating either the Constitution or general policies favoring private property and freedom of contract.<sup>12</sup> Those regulations would equalize bargaining power and presumably lead to a more equal distribution of property.<sup>13</sup> With property more equally distributed, fewer individuals would be subject to the sovereignty or dominion of others, for each would have property of his or her own.

Indeed, most of the analysis of the relational nature of property rights seems either to assume something like equality of ownership or simply to ignore questions of distribution. Consider Wesley Newcomb Hohfeld’s famous statement: “If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to

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<sup>10</sup> Cohen, *Property and Sovereignty*, *supra* note x, at 12.

<sup>11</sup> Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627 (1943). The employer, Hale added, “has little power over those whose freedom to consume is relatively unrestricted, because they have large independent means[.]” *Id.*

<sup>12</sup> *Id.* at 628.

<sup>13</sup> *Id.*

stay off the place.”<sup>14</sup> For his purposes,<sup>15</sup> i.e., the purposes of showing that legal rights inevitably entail relations between persons, it was irrelevant that X as opposed to Y was the right-holder; what was important to understand was that if the circumstances were inverted and Y had a right against X that X should stay off the land, then X would be under a duty to Y to stay off. The inversion of the circumstances would, in fact, reinforce Hohfeld’s main point, which was that rights always involve reciprocal (correlative) duties, whoever holds those rights. Thus, if X and Y were neighbors, each would have rights to keep the other off, and each would have a duty to stay off.

Hohfeld identified four “fundamental legal relations,” including, in addition to rights and correlative duties, privileges and correlative no-rights, powers and correlative liabilities, and immunities and correlative disabilities. It does not seem to have occurred to Hohfeld, or to his many critics and followers,<sup>16</sup> to consider what would happen if someone were to be in a situation in which they *only* owed duties to right holders, had no-rights against privilege holders, were subject to liabilities created by the holders of powers, and were under disabilities because of others’ immunities. This is, however, exactly the situation of those who own very little. It is, as Hohfeld’s analysis suggests, a distinct legal position. And it is also, as Cohen’s argument

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<sup>14</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 32 (1913).

<sup>15</sup> One of Hohfeld’s concerns was to clarify what it meant to have a legal “right” and to distinguish rights “in the strictest sense” (*id.* at 30) from other legal conceptions (“privileges,” “powers,” and “immunities.”) The second, my focus here, was to show that each of these legal interests came paired with a correlative legal interest.

<sup>16</sup> On the “stir” created by Hohfeld’s conceptions, including an exhaustive listing of the articles written in response, see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 989-93 and n.22.

implies, a position of extreme vulnerability to the power of property owners and of the government. I will call this situation “no property.”<sup>17</sup>

“No property” is a negative, a collection of lacks. This quality makes it much more difficult to talk about and to study than property. While the essential or defining attributes of property have long been disputed,<sup>18</sup> there is consensus that property gives its owner a variety of desirable powers and rights. Just to take a few examples, an owner can sell her property (or not sell), give her property away (or choose not to), devise it to those she favors (and not to those who, for whatever reason, she decides should be denied it), and grant physical access to others (or exclude them). The freedom-enhancing aspects of these rights have been extensively explored.<sup>19</sup> Paradoxically, emphasis on all that property gives to those who own it makes it all the harder to understand the situation of those on the other side of those property owners’ rights and freedoms.

Yet “no property,” as difficult as it is to describe, is a reality for those in our society who have only negligible amounts of property, such as the homeless and other people who are extremely poor. Getting hold of this reality is worthwhile for two reasons. First, it allows the

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<sup>17</sup> For preliminary explorations of this concept, see Jane B. Baron, *The “No-Property” Problem: Understanding Poverty by Understanding Wealth*, 102 MICH. L. REV. 1000 (2004); Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAWYER 273 (2004).

<sup>18</sup> For a summary of some of the disputes, see Abraham Bell and Gideon Pachomovsky, *What Property Is*, <http://lsr.nellco.org/wps/papers/9>. For a particularly lucid exploration of this question, see Jeremy Waldron, *What is Private Property?*, 5 OXFORD J. LEGAL STUD. 313 (1985).

<sup>19</sup> On the policies supporting free alienability, see JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 6.7.2 (2d ed. 2005); on the policies supporting gifts, see Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155 (1988-89); on the policies supporting free testation, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1 (1992); on the policies supporting the power to exclude, see Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

sidestepping of what has been a long, but unproductive, debate about the causes of poverty in our society<sup>20</sup> and permits us instead to focus on the legal effects of poverty. Second, it provides a window for evaluating the probable efficacy of legislation designed to deal with problems of poverty. If, for example, a municipality enacts an anti-camping ordinance to keep homeless persons out of public parks at night, but if in the status of “no property” there is no place that such persons have a right to be, then one can predict that the ordinance is unlikely to be successful.<sup>21</sup> And, to take another example, it may be that by ending welfare, those who can work will do so, as some who oppose welfare hope, but if those in the status of “no property” face disabilities and liabilities of enormous magnitude, they simply will not obtain jobs.<sup>22</sup>

This paper seeks to describe the legal category “no property.” Rather than enumerate its iterative disabilities, I enlist a recent novel, Valerie Martin’s *Property*,<sup>23</sup> in the hopes of describing “no property” imaginatively. I do not claim that employing a work of fiction to elucidate a legal problem is substantively or methodologically radical. That there is “law in literature” is hardly surprising, and many before me have pursued legal themes appearing in

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<sup>20</sup> Roughly, this debate pits the idea that poverty is a function of institutional forces against the idea that poverty is the result of individual failures or weaknesses. On the problem of blaming the poor for their problems, see JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* (1997); MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

<sup>21</sup> On the criminalization of homelessness, see Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 *YALE L. & POL’Y REV.* 1 (1996).

<sup>22</sup> The statute replacing the Aid to Families with Dependent Children program with time-limited benefits is the *Personal Responsibility and Work Opportunity Act of 1996*, 42 U.S.C. secs. 601-619.

<sup>23</sup> VALERIE MARTIN, *PROPERTY* (2003). Citations to pages in the novel appear in the text.



literature.<sup>24</sup> Nor do I claim that “no property” is comprehensible *only* imaginatively. As ethnographers of the homeless have shown, for those who inhabit the legal status of “no property,” its attributes are all-too-concretely manifest in gritty realities of daily survival.<sup>25</sup> I claim only that Martin’s novel can help us understand a concept that is difficult to talk about analytically precisely because it is comprised mostly of negatives. *Property* projects these negatives as images in a world and thereby makes them easier to see.

### **A. Property in *Property***

*Property*, set on a plantation not far from New Orleans in 1828, is on one level about the complex relationships between the narrator, Manon Gaudet, her husband, whose given name we never learn, and her house slave, Sarah, who was given to Manon as a wedding present. Manon detests her life on her husband’s sugar plantation (16). Even more, she detests her husband, whom she finds fiscally incompetent, socially boorish, and sexually repulsive. Her acid view of Gaudet is the more bitter for his sexual relationship with Sarah, who by the time of the novel’s opening has borne Gaudet two children, the infant Nell and the uncontrollably wild Walter, who is eight years old and, as it turns out, deaf. Manon’s own choices have compelled Sarah to play

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<sup>24</sup> See, e.g., MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1995); RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984). I should disclose that I have critiqued some of these efforts. See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 *YALE L.J.* 1059 (1999).

<sup>25</sup> See, e.g., GWENDOLYN A. DORDICK, *SOMETHING LEFT TO LOSE: PERSONAL RELATIONS AND SURVIVAL AMONG NEW YORK’S HOMELESS* (1997); DAVID A. SNOW & LEON ANDERSON, *DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE* (1993); ELLEN BAXTER & KIM HOPPER, *PRIVATE LIVES/PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK CITY* (1981).

Manon's role as wife in shadow, for it is in part Manon's manifest distaste for Gaudet's sexual attentions and unwillingness to have his children that has driven him to Sarah. But no one is comfortable with the resulting triangle, in which the characters interlock in a tangle of hypocrisy, hatred and resentment. The situation is summarized when Manon and Sarah are about to leave the plantation for New Orleans to care for Manon's sick mother, and Manon observes, with typical sarcasm:

Nothing could have been more laughable than the touching scene of our departure: the master bids farewell to his wife and servant, tremulous with fear that one of them may not return. But which one? He wishes I might die of cholera, and fears that she may instead. I wish he might be killed while shooting rebellious negroes. She wishes us both dead.  
(63)

Sexuality in various guises—free and compulsory, sanctioned and unsanctioned, enjoyed and hated—is critical to almost all the relationships in the book. Manon's aunt, for example, gives Sarah to Manon in large measure because Sarah had caught the eye of Manon's uncle and thus threatened the aunt's marriage. And one of the novel's leitmotifs concerns the duties of wives to serve their husbands sexually and—in a somewhat darkly developed subplot involving Manon's father—the duties of husbands to sleep with their wives (in addition to, if not in place of, their slaves). Manon's relationship with both Gaudet and Sarah turns on sex: the sex that is not taking place in the Gaudets' marital bedroom, but which Gaudet is obviously having with Sarah; the sex that produces the children that both are (legally) and are not (biologically) Manon's, children she can neither embrace nor deny.<sup>26</sup>

But, not surprisingly in a book so named, it is property law that fundamentally structures

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<sup>26</sup> See LA. CIV. CODE art. 492 (1825) (“The children of slaves and the young of animals belong to the proprietor of the mother of them, by right of accession.”)

the relationships between the characters. There is, to begin with, slavery, which is central to the functioning of the plantation. Gaudet, like his fellows on other plantations, has tremendous power over the slaves he owns.<sup>27</sup> But the planters' ownership simultaneously renders them vulnerable: slaves misbehave and then miss work when disciplined; mistreated slaves run away and must be recaptured. The threat of rebellion surfaces early in the novel, and is ultimately realized. Manon's position as a slave owner is, at the start of the novel, similarly double-edged. She owns Sarah outright, but, as the very existence of Walter and Nell proves, Manon does not entirely control Sarah. From the outset of the novel then, property is both strength and weakness, control and the loss thereof.

The double, paradoxical nature of property is becomes even clearer when Manon's mother dies and Manon learns that her mother has invested her own inheritance from Manon's father more successfully than Manon knew. In addition to a cottage in New Orleans and two slaves, her mother's savings are substantial. Manon inherits it all. One side of her relishes what she has received. "For the first time, I felt myself in possession of the house, an agreeable sensation, unlike any I have ever known." (86) Returning from a dinner at her aunt's, past other homes in the French quarter, Manon re-experiences this joy: "How plain and quiet my own little house seemed in comparison, yet I felt again a pleasurable twinge of ownership as I put the key in the lock and opened the door into the darkened parlor." (93)

But the rational side of Manon knows that with respect to her inheritance, as with respect to Sarah, ownership is not control. Manon is a married woman, and under the regime of

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<sup>27</sup> See LA. CIV. CODE art. 173 (1825) ("The slave is entirely subject to the will of his master . . . .")

coverture Manon's newly received property is in fact commanded by her husband.<sup>28</sup> Manon realizes her situation immediately: "All this is mine, and yet it is not mine, because my husband can, and doubtless will, dispose of it just as soon as I can get it." (83)

Although hardly subtle, the plot to this point works well enough both to illustrate women's legal vulnerability before enactment of Married Women's Property Acts and to keep the reader engaged with Manon. As a character, Manon is bitter, cold, and occasionally cruel, yet it is difficult for the reader not to feel sympathy over her powerlessness or to deny the injustice done to her by property law. When the historical legal consequences of marriage are considered, say, in a law classroom, women's powerlessness is comfortably distant, a problem of another era, one from which we have moved on. The momentum of *Property's* plot, however, enables us to envision an absence of power as a determining, present force affecting a woman's ability to control (or not control) her own life.

Indeed, Martin is particularly acute in showing how property infuses and affects the complex emotional bargaining between Manon and Gaudet. Manon wants to escape the crude life of the plantation and to return to New Orleans and its social season. She requires Gaudet's permission. To obtain it, she plays her "high card," offering Gaudet access to one item of property over which she has substantial control: Sarah. Gaudet is tempted: "He could see it. He would have Sarah to himself and I would be gone." (103) But Gaudet refuses Manon's bid to substitute Sarah and asserts a property right of his own: "You are my wife," Gaudet says. When

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<sup>28</sup> For a general treatment of the property rights of married women in the first half of the nineteenth century, see Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983). See also LA. CIV. CODE arts. 124 (1825) (limiting a wife's power to "alienate, grant, mortgage or acquire . . . title, unless her husband concurs in the act, or yields his consent in writing") and 2373 (denominating the husband as the "head and master of the

Manon won't relent, replying with signature sarcasm, "That is my misfortune," Gaudet plays his own high card, announcing that he intends to seek a buyer for her mother's house. Although Manon protests, "It's *my* house," Gaudet does not even bother to reply; they both are conscious that this assertion is "hollow" (103).<sup>29</sup>

In this interaction, property is ubiquitous and, as at so many points throughout the novel, double. Manon is in some sense Gaudet's property ("you are my wife"), but his "possessory" rights do nothing to alter her disgust for him. If anything, his assertion of his "owner's" powers only pours oil on the fire that is their relationship; she resents him even more. For Manon's part, her inheritance of her mother's property gives her a taste of freedom, but her husband's legal control denies her ability to realize that freedom. It is not necessarily better, to borrow a phrase, to have owned and lost than never to have owned at all. And so Manon reflects, as she prepares to leave New Orleans after her mother's funeral: "I felt like a prisoner who has been led from his dark cell into the daylight, shown a gay, lively, sunny world, and told, all this is yours, and whenever you can persuade your jailor to accompany you, you may see it again." (92) For both Manon and Gaudet ownership promises power, control, but it cannot deliver.

Martin is careful to sustain this theme as the novel develops. Manon understands that only Gaudet's death will free her, divorce being nearly impossible to obtain.<sup>30</sup> The advent of the long-rumored slave uprising brings Manon's vague desires for Gaudet's death to fruition; the

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[marital] partnership").

<sup>29</sup> See, e.g., LA. CIV. CODE art. 2373 (1825) ("The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an incumbered title, without the consent and permission of his wife.")

<sup>30</sup> See, e.g., LA. CIV. CODE arts. 133-139 (1825).

rebel slaves who attack the Gaudet plantation brutally kill Gaudet before Manon's eyes, even as he attempts to protect her. But at virtually the same melodramatic moment as Gaudet dies and Manon regains her freedom as a property owner, her slave Sarah escapes—on the very horse Manon had hoped to ride away from the carnage.

The loss of Sarah is by no means trivial to Manon. After the uprising is put down, Manon sells the plantation, clearing Gaudet's substantial debts. Now at last Manon is independent, returning to New Orleans with renewed gratitude "to my mother for her sound investments, her excellent financial sense." (138) But Manon cannot truly enjoy her freedom, psychologically speaking, until she regains control of Sarah. Indeed, her concern to find Sarah borders on the obsessive, resulting in her hiring of Mr. Leggett, specialist in the capture of runaways, whose efforts to track and trap Sarah are described in detail.

The novel's final section highlights the frustrations of ownership without control. Manon's search for Sarah is perhaps not unusual. Her father, we learn, would chase a runaway down "if it took him six months and cost as much as the man was worth." (128) But while Manon's father would "never keep a runaway," Manon takes a completely different position. When Mr. Roget, a free man of color who has fancied Sarah since even before she was given to Manon, offers while Sarah is still at large to purchase Sarah for twice her value, taking troublesome Walter and Nell in the bargain, Manon declines. Instead, asserting her power as owner, she proposes that Roget marry Sarah. She knows this proposition will only outrage Roget. "A free man married to a slave! His children would be mine, to do with as I pleased." (171).<sup>31</sup> If Manon cannot realize her desire to retake control of Sarah, she certainly will not

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<sup>31</sup> See LA. CIV. CODE art. 95 (1825) ("Free persons and slaves are incapable of

allow Roget the satisfaction she herself has been denied.

Manon experiences a similar frustration in her own social world. Now that Gaudet has died, Manon can pursue Joel Borden, who has appeared as a counterpoint to Gaudet—and potential love interest for Manon—from the outset of the novel. Borden, a city sophisticate where Gaudet was a country boor, begins to court Manon. But his interest in marrying her is immediately extinguished when he learns that, because of Gaudet’s debts, Manon is not in fact a wealthy widow. Manon is well aware that it is her limited property that causes Borden’s affections to suddenly change:

It seemed that happiness must always be just beyond me and I should always stand gazing in at it as through a shopwindow where everything glittered and appealed to me, but I had not enough money to enter. It was money, only money, that would keep Joel from ever being more than my friendly admirer. (148)

Manon has emerged from the choking hold of her husband and attained independence, but it is still not enough. Sarah remains at large, and Manon’s inherited money cannot buy her what she wants. Property, as throughout the book, is necessary, but even in relative abundance it is still not sufficient to guarantee Manon contentment.

Part of the doubleness of property in the novel stems from the fact that ownership is being asserted over human beings, not tangible things. As objects of property, Manon and Sarah’s agency must be denied, but because they are also breathing subjects, their agency cannot be suppressed. Thus Manon is both subservient to Gaudet’s will and yet resistant; for a time, before giving up sex with him altogether, she enacts this resistance in their bedroom, but with typical

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contracting marriage together; the celebration of such marriages is forbidden, and the marriage is void. . . .”) *See also* LA. CIV. CODE art. 183 (1825) (“Children born of a mother then in a state of slavery, whether married or not, follow the condition of their mother; they are consequently

passive aggression, when she realizes, horrified, that Gaudet finds her resistance arousing, she opts instead for drugged nonresponsiveness. (56)

The subject/object problem is even more pronounced with respect to Sarah. Manon believes that Sarah must have received assistance in evading capture, probably from Roget, and she threatens him as follows:

“Assisting Sarah in any way is strictly unlawful. The fines are heavy. Once she has been returned to me, it is my intention to prosecute anyone who can be proved to have aided her in her flight. I don’t think of her as having run away, you see, I think of her as having been stolen.” (171)

As Sarah’s owner, Manon here cannot attribute agency to Sarah; Sarah did not decide to leave, but rather, as an object, was taken. At the same time, once Sarah is returned, Manon berates her for not acting as an accountable agent:

“It’s useless to talk about responsibility to you people,” I continued. “You have no sense of it. That’s the gift we give you all. You just run away and we bring you back and you never have the slightest twinge of conscience. No one ever holds you responsible for your actions. It’s just assumed you have no moral sense.” (191)

Putting aside the irony of treating an escape attempt as an act of irresponsibility, this speech is remarkable for its indirect acknowledgment that Sarah made her own choice in leaving; this is the “action” for which, Manon says, she ought to take responsibility. The object she accuses Roget of stealing is here a subject, capable of acting better than she has in fact behaved. Indeed, in the very next interchange, Sarah’s agency is explicitly acknowledged, when Manon self-pityingly laments the injuries she sustained in the slave uprising, saying, “It’s thanks to you I’m a cripple.” (191)

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slaves and belong to the master of their mother.”)



The property in *Property* to some degree simply dramatizes Cohen’s famous observation about property and sovereignty. We see acted out in the story the power that the law gives to Gaudet with respect to Manon, and to Manon with respect to Sarah. While we might not need this dramatization—Cohen’s point is certainly comprehensible at the conceptual level—the employment of Cohen’s insight, its imbeddedness in the characters and their situations, provides another way to “know” what he is saying.

Through the story, Martin can also illustrate in concrete terms what might on the conceptual level be understood to be qualifications to the property/sovereignty point. It is widely accepted that property is never absolute,<sup>32</sup> that owners’ powers may be limited in a wide variety of situations—by, for example, the routine mechanism of zoning<sup>33</sup> or the more extraordinary justification of necessity.<sup>34</sup> *Property* dramatizes these qualifications in a way that demonstrates how easily exceptions may come to swallowing the rule. Property may give its owner “*imperium* over . . . fellow human beings,” but sovereignty is complicated, nuanced and in important ways partial. In their resistance, their passive aggression, and their persistent defiance of their own subjugation, Manon and Sarah undermine the power sought to be exerted over them. Their subtle negotiations—via sex, via silence—illustrate the ways in which power is not a “thing,” but

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<sup>32</sup> See Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L.J. 601 (1998) (discussing and critiquing Blackstone’s famous description of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”)

<sup>33</sup> See *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926) (upholding zoning against constitutional attack).

<sup>34</sup> See SINGER, *supra* note x, at § 2.3.3 (describing circumstances in which “non-owners are entitled to enter property possessed by another in order to save lives or property or otherwise avert a serious harm.”)

“the product of an interplay of actions and attitudes between social actors, each equipped with corresponding or complementary images of a particular social relation.”<sup>35</sup>

### **B. “No Property” in *Property***

Just as it is not accidental that the property interests asserted in *Property* primarily concern people, it is not accidental that the people in question are women. As a married woman, Manon is vulnerable to the power of her detested and detestable husband. As a female slave, Sarah is vulnerable to virtually everyone. *Property* dramatizes these vulnerabilities and, by contrasting them, sharpens our understanding of the legal status attending the complete absence of ownership rights.

Let us return to Manon in the period between the death of her mother and the night her husband is melodramatically murdered. While technically she has inherited her mother’s home, slaves, and, most important, money, as a practical matter these assets are not hers to dispose. The law empowers Gaudet to use them as he chooses;<sup>36</sup> this is why he can effectively threaten to sell the New Orleans cottage, and this is why Manon is certain that Gaudet will quickly squander the cash. (72) Relative to Gaudet, Manon is in the legal status “no property.” Gaudet has rights with respect to what would, apart from their marriage, be “her” property; she has “no-rights” with

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<sup>35</sup> Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 741-42 (1996). See also William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1450 (1992):

Power . . . is constructed and reconstructed so that its possession is neither necessarily obvious nor rigidly determined. . . . Power is mobile and volatile, and it circulates . . . . Even to describe power as an “it” implies more of an independent existence than we intend. It is better, perhaps, to view it as a dimension of relationships rather than a resource under someone’s control.

<sup>36</sup> See *supra* notes x-y [on husbands’ control of their wives property]

respect to that very property. Her lack of rights over her “own” property renders her vulnerable to him; since he and only he has the legal power to deal with all the assets of both parties to the marriage, he effectively controls her material well-being. Manon’s powerlessness vividly portrays what the legal status of coverture entails. On this subject, Martin presses hard on the obvious feminist nerve.

To say that Manon occupies the status “no property” with respect to her husband is not to say that she has no rights at all. She has whatever rights wives have with respect to their husbands;<sup>37</sup> she has the general rights of any ordinary citizen (e.g., against compelled self-incrimination). Moreover, to say that Manon occupies the status “no property” with respect to her husband is not to say that she has no power at all with respect to him. She can bring to bear the force of her personality, she can enforce extra-legal norms governing the behavior of men toward women, and she can use the knowledge gained of experience living with him to try to influence what he does. Whether any of these avenues will actually be effective is unclear, especially given the woeful state of their emotional relationship, but Gaudet’s control of Manon—like any exercise of power—is subject to resistance and contest.<sup>38</sup>

Finally, to say that Manon occupies the status “no property” with respect to her husband is not to say that she has no power in the world. She quite obviously does. On the very night

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<sup>37</sup> See, e.g., LA. CIV. CODE art. 122 (1825) (“The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the conveniences of life, in proportion to his means and conditions.”)

<sup>38</sup> See *infra* text accompanying note x. If power is understood not as “an ‘it,’” but as a “dimension of relationships,” Felstiner & Sarat, *supra* note x, at 1450, then we would expect to see exactly what Martin portrays: Manon chafes against her husband’s commands and does everything she can to irritate and defy him.

Manon learns of her mother's fortune and begins to worry about Gaudet's waste of it, she sits alone with Sarah, who has been nursing her baby. Manon orders Sarah to put the child aside and then, rather bizarrely, leans over to suck at Sarah's breast. "This is what he does," Manon reflects, thinking of Gaudet. Manon is experiencing a kind of power, a freedom to satisfy her own desires, that as a woman and a wife she has never experienced before: "A sensation of utter strangeness came over me, and I struggled not to swoon. . . . How wonderful I felt, how entirely free." (76) As vulnerable as Manon is, then, to Gaudet, she is, with respect to Sarah, still a person of great power, able to have her own way and to taste, both literally and metaphorically, the pleasures her husband enjoys.

Sarah, of course, is *not* a person of great power. Except for the interlude of her escape, there is no context in which she controls her own destiny. Before she is given to Manon, while she is still owned by Manon's aunt, Roget offers to buy her in order to free her; Manon's uncle not only refuses, but he fires Roget and whips Sarah. (19) When Sarah is first sent to Gaudet's plantation, she falls in love with the butler, Bam, and bears him a child. Again, not only does Gaudet deny Bam's request to marry Sarah,<sup>39</sup> but he takes away their baby and ultimately sells Bam so that he can have Sarah for himself. (23-24) Sarah is under the sexual command of Gaudet; the rest of her life is controlled almost entirely by Manon. Even with respect to her own children she has no autonomy;<sup>40</sup> she can keep them only if and for so long as she can persuade

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<sup>39</sup> See LA. CIV. CODE art. 182 (1825) ("Slaves cannot marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contract.")

<sup>40</sup> See LA. CIV. CODE art. 183 (1825) ("Children born of a mother then in a state of slavery, whether married or not, follow the condition of their mother; they are consequently slaves and belong to the master of their mother.")

Gaudet—and, after his death, Manon—to let her.

Here then we see projected as affirmative images the iterative negative disabilities of which “no property” is constituted. Everyone else’s property rights—Manon’s aunt’s, Gaudet’s, Manon’s—affect Sarah. Literally, they determine her location in space, her “transfer” from New Orleans, where she can see Roget, to Gaudet’s plantation, where she cannot. Manon’s ownership rights allow her to use Sarah as a pawn in the strategic emotional games she plays with her husband, to proffer Sarah’s sexual services to Gaudet (as she offers as part of her gambit to return to the New Orleans social season) or to withhold those services (as she does when she takes Sarah to New Orleans to help care for her mother). Manon, in other words, can use her property rights with respect to Sarah to resist and counteract Gaudet’s ownership rights; Manon can use Sarah for other, unrelated, purposes of her own.<sup>41</sup> Sarah has no similar rights with which to, as it were, fight back. The freedom that ownership grants to all the other characters is experienced by Sarah as something like freedom’s opposite; she is *not* free to stay near her lovers, to keep her children, to cease serving Manon.<sup>42</sup>

No wonder, then, that Sarah takes advantage of the confusion and chaos of the slave uprising to escape. Only Manon could be surprised when Sarah steals the horse Manon had herself intended to ride away from the carnage; only Manon could find it difficult to imagine why, with Gaudet dead, and Sarah “safe from him,” (127) Sarah might still feel the desire to flee.

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<sup>41</sup> “No one,” Manon observes, “could dress my hair so well as Sarah, nor care for my clothes, not arrange the rooms.” (190)

<sup>42</sup> Sarah’s inability to control essential aspects of her own life is epitomized in the decisions respecting her children. The child she had with Bam, the butler, on first arriving at the plantation is sold away. She then has two children by Gaudet, pregnancies she cannot control. The baby Nell dies during Sarah’s escape attempts. Manon chooses to keep the unruly, deaf Walter, the other child Sarah has borne to Gaudet, despite Sarah’s “aversion” to him. (190)

Manon, indeed, is continually surprised by Sarah's resourcefulness in eluding capture. To the extent Manon has objectified Sarah, it would be hard for her to think of Sarah as a person of volition and imagination. What Manon cannot seem to understand is that, given Sarah's pervasive vulnerability to all the white people she lives among, Sarah effectively has nothing to lose by running away, and much, potentially, to gain.

Just how much is dramatized in two conversations that take place toward the end of the book. The first follows the capture of Sarah, who, it turns out, traveled all the way to New York in disguise as a white man before her apprehension. Manon and her aunt discuss the length of time during which Sarah has been at large:

“Your uncle cautions you that Sarah may be very different when she returns,” my aunt said. “She has passed as a free woman, and that experience is generally deleterious to a negro's character.”

“She had done more than that,” I observed. “She has tasted a freedom you and I will never know.”

My aunt looked perplexed. “What is that?” she said.

“She has traveled about the country as a free white man.” (189)

Here again, Martin's feminist themes are unmistakable; men can do things women, even “free” women, simply cannot.<sup>43</sup> In this dialogue, moreover, Sarah-the-object is recognized as a subject, capable of intellectual growth and personal change through experience. And the experience is one that, under the double disability of her gender and race, she could not otherwise have. Her period of freedom, precarious and short-lived as it was, stands in sharp contrast to the limits on Manon and her aunt's lives, and in even sharper contrast to the limits on Sarah's.

The book's final conversation brings home just how narrow those limits are. In what

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<sup>43</sup> Martin's hand is heavy on this point. Sarah travels under the pseudonym “Mr. Maitre.” (185)

even Manon realizes is the longest statement Sarah has ever made, Sarah describes her brief experience in New York:

“When you gets to the North,” she said, “they invites you to the dining room, and they asks you to sit at the table. Then they offers you a cup of tea, and they asks, ‘Does you want cream and sugar?’” (192)

Sarah has never been *asked* anything before. She has been ordered, commanded, told what to do. During the course of the novel, Manon occasionally speculates about such matters as Sarah’s feelings for her children and for Gaudet, but she never actually inquires; she is indifferent to Sarah’s actual feelings. And because Manon has objectified Sarah, she is “dumbfounded” at Sarah’s reaction to the minimal civility she was shown during her escape: ““And this appealed to you?” I asked.” (192) When Sarah responds that it did, Manon is incredulous. “What on earth did they think they were doing?” she asks herself, referring to Sarah’s rescuers.

Martin’s interest is clearly in the relationship between Sarah and Manon, particularly in the complexity of their negotiations over Sarah’s status as subject or object. To the extent that Sarah is a mere object, Manon’s indifference to her actual emotions only makes sense; would one inquire of a table or a book how it feels? And yet Manon cannot totally objectify Sarah, if only because she seems to want Sarah to feel something for her. Thus Manon castigates Sarah for stealing the horse on which the latter escaped, rather than leaving it for Manon: ““You knew my husband was dead,’ I said. ‘There was no reason for you to run. They weren’t going to kill you.’” (192) And then Manon laments to Sarah, with obvious self-pity, that “your new friends in the North” never asked “how you got away or whom you left behind.” (192)

Yet the contradictions in the relationship are to some extent a product of Sarah’s legal

status. As a slave, of course Sarah is objectified, denied agency, abused and oppressed. As a human, of course Sarah continues nonetheless to feel, to desire, to resist her objectification. To the very considerable extent, *Property* simply—perhaps simplistically—dramatizes this contradiction at the heart of slavery.

But the slavery issue only raises in particularly exaggerated form a more general point about property: the less of it one has, the more vulnerable one is, especially to those who have more of it. Martin sees that one's status—as a married woman, as a slave—directly affects one's position vis a vis property. It is *because* Manon is married that her control over what would otherwise be “hers” is so tenuous. It is *because* Sarah is a slave that she is Manon's property; Roget, a free black, is not property.

Yet the converse is also true. Sarah's position as the object of property defines her status as a slave. Manon's lack of ownership and control rights defines her status as a married woman. In this sense, they are what they own—or, more accurately, what they do not and cannot own.

### **C. Property Today**

It is hardly breaking news that coverture denied power and, to some degree, agency to married women, relegating them to the legal status, effectively, of children, largely incapable of legal action in a variety of spheres. Nor are the indignities and inhumanity of slavery—the presumption that subjects can be objects—matters of which we have been unaware. Yet Martin's depiction of the connections between legal status, property, and social power is not of purely historical (and certainly not of purely literary) interest. Notwithstanding enactment of Married Women's Property Acts and the end of slavery, many of the same kinds of connections can be



drawn today. Contemporary law is nominally committed to the proposition that one's status—particularly one's status as an owner of property—should not determine one's position in society. But the reality of that commitment can be questioned.

For the fact is that those who own very little property—the homeless, for example, or the extremely poor—remain in a position of substantial legal and social vulnerability. Imagine a person who has limited income, lacks health benefits, and depends for housing on Section 8 housing vouchers. Should the Section 8 program be eliminated or substantially cut, as seems quite possible,<sup>44</sup> this person will be unable to pay her rent. She may then turn to relatives, but they have no legal obligation to take her in, and she has no legal claim on them for shelter. What is true of the relatives is doubly true of strangers—largely other landlords—to whom she might turn. Property owners have the power/privilege to exclude her; she has no legal power to stop them from doing so and, therefore, she stands in a position of legal liability/vulnerability with respect to them.<sup>45</sup>

Thus, the exercise of the landlord/owner's freedom to exclude may be experienced by the evicted tenant exactly as Sarah experiences Manon's freedom of ownership, i.e., as freedom's opposite.<sup>46</sup> This reality is hard to face, as it challenges the comforting notion that property

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<sup>44</sup> See, e.g., Madison Park, "Menino Says Bush Budget May Worsen Homelessness," *The Boston Globe*, B3 (March 10, 2005); Nancy Trejos, "Study Predicts Cuts Could Ravage Housing Vouchers," *The Washington Post*, C6 (March 6, 2005); David W. Chen, "HUD Aid Short by \$50 Million," *The New York Times*, B1 (Jan. 27, 2005).

<sup>45</sup> Nor is the government obliged to help. The United States Supreme Court has held that there is no constitutional right to housing. *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>46</sup> The consequences of this vulnerability to loss of housing may be amplified by other legal disabilities. In America, few people have legal rights to the jobs they hold. See, e.g., Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2000) (describing the employment at will doctrine as a "basic premise

enhances freedom and ought to have a special status for that reason alone.<sup>47</sup> Remarkably, recent scholarship in the property area, however well-intentioned, has only further obfuscated and obscured the freedom-limiting attributes of “no property.” This scholarship relentlessly emphasizes property’s contribution to individual and social well-being: its capacity to protect resources from waste,<sup>48</sup> to allay strife and encourage investment,<sup>49</sup> to enhance individuals’ capacity for self-direction,<sup>50</sup> or to express its owner’s values.<sup>51</sup> Indeed, some of this scholarship presents the disabilities of those who do not own property as part of the justification for the private property system; the “in rem nature of property rights,” they argue, lowers information costs to the “large and indefinite class of dutyholders” who need to know “what constraints on their behavior such rights impose.”<sup>52</sup>

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undergirding American labor law”). Millions of people lack health insurance. According to the US Census Bureau, “an estimated 15.6 percent of the population, or 45.0 million people, were without health insurance coverage in 2003, up from 15.2 percent and 43.6 million people in 2002.” <http://www.census.gov/hhes/www/hlthins/hlthin03/hlth03asc.html> (visited March 25, 2005). Thus, persons owning little property are vulnerable not only to the exercise of others’ property rights, but also to the legal power of their employers and to the vagaries of government benefit programs, the eligibility standards for which they do not control.

<sup>47</sup> See Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996) (describing and criticizing this notion).

<sup>48</sup> Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 (1999).

<sup>49</sup> Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 134-35 (1998).

<sup>50</sup> Hanoeh Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 568-70 (2001).

<sup>51</sup> Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 824-30 (2005).

<sup>52</sup> Merrill & Smith, *supra* note x, at 386-87. See also Henry E. Smith, *Property and Property Rules*, 79 NYU L. REV. 1719 (2004) (defending the right to exclude in terms of the

The American private property regime may well achieve all of these individual and social objectives—with respect, that is, to those who own property. The question, however, is what a private property scheme means for people who do not. Such persons are not in danger of wasting assets to which they do not have access; they cannot invest such assets, nor use them to express their values. The relentless emphasis on property’s abstract positives distracts our attention from the less-appealing reality that many people may always and only be those “dutyholders” whose behavior is subject to systematic “constraints” in favor of the rights of others. Such persons can hardly be “self-directing” in the manner promised by these happy property stories.

Consider, in this regard, Margaret Radin’s now famous theory about the connection between property and personhood.<sup>53</sup> Radin’s “personhood perspective” presumes that “to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances take the form of property rights.”<sup>54</sup> There may be much to be said for her view that “objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world.”<sup>55</sup> But what of those who do not own objects with which to constitute themselves? Radin proposes a regulatory solution to the problem, suggesting that “a government that respects personhood must guarantee citizens all entitlements necessary for personhood” and, in addition, “cease allowing one person to impinge on the personhood of another by means of her control over

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clarity of the message to dutyholders to keep out).

<sup>53</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 959.

tangible resources.”<sup>56</sup> These reforms have not occurred; our government does neither. As a result, there will be people unable to achieve the “proper self-development” Radin’s theory envisions.<sup>57</sup>

The gap between the theoretical and the actual recurs in other contexts. Like anyone else, the poor and the homeless have a variety of non-property related rights. They may protest their situation in public squares under the First Amendment, for example, or call upon the police to protect them from, say, assaults by other citizens. But these rights may not work for those with scant resources the way they do for others. Those without significant property are not in a position to buy much exposure for their views. And while the police might protect them in their peaceful demonstrations in public fora, those same officers may later in the day be moving them out of those same public spaces where, after dark, the protesters become trespassers. In the situation of “no property,” one’s abstract rights to speech and liberty, like one’s abstract right to hold property, do not provide much actual freedom in the real world.

Again, this observation is not meant to suggest that property theorists such as Radin are wrong,<sup>58</sup> only that scholarly approaches focusing primarily on the social and individual benefits

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<sup>56</sup> *Id.* at 990.

<sup>57</sup> I do not mean to suggest that the homeless and the extremely poor own no objects of the sort Radin would recognize as “personal” in the sense of warranting more protection than purely “fungible” property. To the contrary, the relatively few tangible possessions of which, say, a homeless person has managed to retain control may have a value to him or her far beyond their dollar equivalent, just as Radin suggests. It is far from clear, however, that ownership of a few such objects is sufficient to “constitute” their owners “as continuing personal entities in the world.” How much *would* be enough for that purpose is a question well beyond the scope of this essay. The focus here is on those who own dramatically little, who lack what is necessary, mooting the question of what would be sufficient.

<sup>58</sup> For such a suggestion, see Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347, 352 (1993) (arguing that

that property is capable of producing occlude a dark side of our property system. If, following Radin, we imagine that having property is part of what constitutes individuals as subjects, we need to take seriously that not having property might constitute individuals, effectively, as objects. For those virtually without material resources of any kind, the quality of their life is largely determined by rights they do not have and liberties they may not be able to exercise. The less property they have, and the fewer legal powers, the greater their vulnerability to the power of others. One of these vulnerabilities is precisely that dramatized by Sarah, which is that, because she has no resources to mobilize negotiating her relationships with Manon and Gaudet, she becomes for them an object.

This objectification is not complete. As we earlier saw, Sarah's agency can never be entirely effaced. And this is true of the extremely poor and the homeless as well. The poor are not non-persons, and like the Sarah character, they often develop surprisingly resourceful strategies for survival under difficult circumstances.<sup>59</sup> Yet, as advocates for the homeless have repeatedly described, their humanity is easy to ignore.<sup>60</sup> With so little impact on the world, why should they be taken seriously as subjects?

This is not just a matter of the psychology of those who pass the homeless by.<sup>61</sup> It is a

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Radin's analysis "both hides and glorifies power.")

<sup>59</sup> See *infra* note x [ethnographies of homelessness].

<sup>60</sup> See, e.g., KIM HOPPER, RECKONING WITH HOMELESSNESS 215 (2003) (describing how "the rest of us" . . . learned to ignore, then tolerate, then grow weary of . . . the ugly evidence of a social order gone badly awry.")

<sup>61</sup> Some advocates for the homeless argue that an effective solution to the homelessness problem will require understanding the attitudes of those in a position to help the homeless. See Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207 (2000); Gary Blasi, *And We Are Not Seen:*

matter of the law. As we have seen, our private property regime gives much to those who own property—rights of self-definition, rights to exclude, even rights to destroy.<sup>62</sup> Under this regime, however, some people will own virtually nothing.<sup>63</sup> For such persons, the freedom-enhancing aspects of property are more or less beside the point. As a practical matter, what they experience as a legal matter is, to recur to Hohfeld’s terms, duties, no-rights, liabilities and disabilities. These iterative negatives together constitute a status, a status in which it becomes possible for them to be seen as, effectively, objects, not subjects. Nonowners are not slaves to be sure, but in their pervasive vulnerability to others’ exercises of power, they are not so different from Sarah as perhaps we would like to believe. We can continue to take comfort in the notion that property, at least potentially, enhances freedom, but as wealth disparities grow, and progressively more people own increasingly less, we must also attend to the “unfreedom,” if you will, of “no-property.”

### **Conclusion**

It seems trite to note that the poor have little property; if they owned a reasonable amount of property, they would, of course, not be poor. The usual question asked about the poor is why they have so little and lack so much. Embedded in the question is the assumption, usually unstated, that the case for government intervention to ameliorate the effects of poverty is stronger if that poverty can be traced to institutional forces such as labor or housing market changes rather

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*Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAVIORAL SCIENTIST 563 (1994)

<sup>62</sup> See *infra* notes y-z.

<sup>63</sup> Non-ownership raises no constitutional issues. *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1 (1973).

than individual failures such as drug addiction.<sup>64</sup>

Whether or not the assumption underlying the what-causes-poverty debate holds true,<sup>65</sup> it may be useful to ask a different question. This question asks what can realistically be expected from regulation directed at the extremely poor. If, for example, we wish to clear the homeless from certain public spaces, there must, as a practical matter, be another place to which they can go.<sup>66</sup> But if they subsist in the legal status “no property,” there may not be any such space.

Effective regulatory schemes take existing schemes of property rights into account. “No property” is such a scheme. Because it consists so largely of negatives, of rights and powers that people do not have, it is difficult to recognize it as such. But it is as serious a constraint on regulatory possibility as, say, the ownership rights of those affected by limitations on the cutting of old growth forests or by required reductions in factory emissions. If we want to “do something” about the poor and the homeless—whether it be banishing them to special “zones”<sup>67</sup> or targeting services to them<sup>68</sup>—we will need to understand the legal situation in which we find them. For this reason, we must continue to seek to understand and define the legal category “no

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<sup>64</sup> For a description of how this assumption works in the context of homelessness, see Baron, *The “No Property” Problem*, *supra* note x, at 1010-1012; Baron, *Homelessness as a Property Problem*, *supra* note x, at 279-82.

<sup>65</sup> For an argument that it does not, see *id.*

<sup>66</sup> For an argument that the homeless should be removed from certain public spaces, and that a zone be created for them in other public spaces, see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165 (1996).

<sup>67</sup> *See id.*

<sup>68</sup> *See* MARTHA BURT ET AL, HELPING AMERICA’S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING 330 (2001) (arguing both for housing subsidies and “targeting prevention.”)

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